

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

5	TINA M. GLASGOW,	)	
6	Plaintiff,	)	No. CV-09-0223-CI
7	v.	)	ORDER GRANTING PLAINTIFF'S
8	MICHAEL J. ASTRUE,	)	MOTION FOR SUMMARY JUDGMENT
9	Commissioner of Social	)	AND REMANDING FOR ADDITIONAL
10	Security,	)	PROCEEDINGS PURSUANT TO 42
11	Defendant.	)	U.S.C. § 405(g)

BEFORE THE COURT are cross-Motions for Summary Judgment. (Ct. Rec. 13, 15.) Attorney Maureen J. Rosette represents Plaintiff; Special Assistant United States Attorney Michael S. Howard represents Defendant. The parties have consented to proceed before a magistrate judge. (Ct. Rec. 7.) After reviewing the administrative record and the briefs filed by the parties, the court **GRANTS** Plaintiff's Motion for Summary Judgment and remands the case to the Commissioner for additional proceedings.

On February 26, 2007, Tina Marie Glasgow (Plaintiff) protectively filed for disability insurance benefits (DIB) and Supplemental Security Income (SSI). (Tr. 119.) She alleges onset of disability on February 6, 2006, due to degenerative arthritis, back pain and asthma. (Tr. 123.) Plaintiff's date of last insured for DIB purposes was March 31, 2010. (Tr. 11.)

Following a denial of benefits at the initial stage and on reconsideration, a hearing was held before Administrative Law Judge

1 (ALJ) R. S. Chester on October 23, 2008. (Tr. 25-49.) Plaintiff,  
2 who was represented by counsel, and vocational expert Deborah N.  
3 Lapoint, appeared and testified. (*Id.*) On November 28, 2009, ALJ  
4 Chester denied benefits. (Tr. 11-21.) The Appeals Council denied  
5 Plaintiff's request for review. (Tr. 1-4.) This appeal followed.  
6 Jurisdiction is appropriate pursuant to 42 U.S.C. § 405(g).

#### 7 STANDARD OF REVIEW

8 In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9<sup>th</sup> Cir. 2001), the  
9 court set out the standard of review:

10 The decision of the Commissioner may be reversed only  
11 if it is not supported by substantial evidence or if it is  
12 based on legal error. *Tackett v. Apfel*, 180 F.3d 1094,  
13 1097 (9<sup>th</sup> Cir. 1999). Substantial evidence is defined as  
14 being more than a mere scintilla, but less than a  
15 preponderance. *Id.* at 1098. Put another way, substantial  
16 evidence is such relevant evidence as a reasonable mind  
17 might accept as adequate to support a conclusion.  
18 *Richardson v. Perales*, 402 U.S. 389, 401 (1971). If the  
19 evidence is susceptible to more than one rational  
20 interpretation, the court may not substitute its judgment  
21 for that of the Commissioner. *Tackett*, 180 F.3d at 1097;  
22 *Morgan v. Commissioner of Social Sec. Admin.* 169 F.3d 595,  
23 599 (9<sup>th</sup> Cir. 1999).

24 The ALJ is responsible for determining credibility,  
25 resolving conflicts in medical testimony, and resolving  
26 ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9<sup>th</sup>  
27 Cir. 1995). The ALJ's determinations of law are reviewed  
28 *de novo*, although deference is owed to a reasonable  
construction of the applicable statutes. *McNatt v. Apfel*,  
201 F.3d 1084, 1087 (9<sup>th</sup> Cir. 2000).

It is the role of the trier of fact, not this court, to resolve  
conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence  
supports more than one rational interpretation, the court may not  
substitute its judgment for that of the Commissioner. *Tackett*, 180  
F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9<sup>th</sup> Cir. 1984).  
Nevertheless, a decision supported by substantial evidence will

1 still be set aside if the proper legal standards were not applied in  
2 weighing the evidence and making the decision. *Browner v. Secretary*  
3 *of Health and Human Services*, 839 F.2d 432, 433 (9<sup>th</sup> Cir. 1988). If  
4 there is substantial evidence to support the administrative  
5 findings, or if there is conflicting evidence that will support a  
6 finding of either disability or non-disability, the finding of the  
7 Commissioner is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-  
8 1230 (9<sup>th</sup> Cir. 1987).

#### 9 SEQUENTIAL PROCESS

10 Also in *Edlund*, 253 F.3d at 1156-1157, the court set out the  
11 requirements necessary to establish disability:

12 Under the Social Security Act, individuals who are  
13 "under a disability" are eligible to receive benefits. 42  
14 U.S.C. § 423(a)(1)(D). A "disability" is defined as "any  
15 medically determinable physical or mental impairment"  
16 which prevents one from engaging "in any substantial  
17 gainful activity" and is expected to result in death or  
18 last "for a continuous period of not less than 12 months."  
19 42 U.S.C. § 423(d)(1)(A). Such an impairment must result  
20 from "anatomical, physiological, or psychological  
21 abnormalities which are demonstrable by medically  
22 acceptable clinical and laboratory diagnostic techniques."  
23 42 U.S.C. § 423(d)(3). The Act also provides that a  
24 claimant will be eligible for benefits only if his  
25 impairments "are of such severity that he is not only  
26 unable to do his previous work but cannot, considering his  
27 age, education and work experience, engage in any other  
28 kind of substantial gainful work which exists in the  
national economy . . . ." 42 U.S.C. § 423(d)(2)(A). Thus,  
the definition of disability consists of both medical and  
vocational components.

23 The Commissioner has established a five-step sequential  
24 evaluation process for determining whether a person is disabled. 20  
25 C.F.R. §§ 404.1520(a), 416.920(a); see *Bowen v. Yuckert*, 482 U.S.  
26 137, 140-42 (1987). In steps one through four, the burden of proof  
27 rests upon the claimant to establish a prima facie case of

entitlement to disability benefits. *Rhinehart v. Finch*, 438 F.2d 920, 921 (9<sup>th</sup> Cir. 1971). This burden is met once a claimant establishes that a physical or mental impairment prevents her from engaging in her previous occupation. 20 C.F.R. §§ 404.1520(a)(4)(i-iv), 416.920(a)(4)(i-iv). At step five, the burden shifts to the Commissioner to show that (1) the claimant can perform other substantial gainful activity; and (2) a "significant number of jobs exist in the national economy" which claimant can perform. 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v); *Kail v. Heckler*, 722 F.2d 1496, 1498 (9<sup>th</sup> Cir. 1984).

#### STATEMENT OF FACTS

The facts of the case are set forth in detail in the transcript of proceedings, and are summarized briefly here. At the time of the hearing, Plaintiff was 49 years old, unmarried with two adult children. She stated she lived in a house with her daughter and grandchildren. (Tr. 30-32.) She has a tenth grade education and is a certified nurse's aide. (Tr. 34.) Plaintiff has past work experience as a home attendant, nurse's aide, cashier, checker, dishwasher, bartender, and a stock clerk. (Tr. 44-45.) She testified she cannot work because of back pain and limitations in her ability to stand and sit for any length of time. (Tr. 35-36.) She also reported things drop from her hand because of problems with arthritis and numbness in her right hand. (Tr. 42.) Plaintiff testified she has been unable to stop smoking, and she uses a nebulizer for chronic asthma. (Tr. 41.)

#### ADMINISTRATIVE DECISION

The ALJ found Plaintiff had not engaged in substantial gainful

1 activity since her alleged onset date. (Tr. 13.) At step two, he  
2 found Plaintiff has medically determinable impairments of  
3 "degenerative disk disease of the lumbar and cervical spine, asthma,  
4 depression, cannabis dependence, and opioid dependence." (*Id.*) He  
5 found non-severe impairments of gastroesophageal reflux disease and  
6 nicotine dependence. (Tr. 14.) At step three, the ALJ found  
7 Plaintiff's impairments alone and in combination did not meet or  
8 medically equal a listed impairment in 20 C.F.R. Part 404, Subpart  
9 P, Appendix 1 (Listings). (Tr. 18.) At step four, he found  
10 Plaintiff had the residual functional capacity (RFC) to perform  
11 light work with several non-exertional limitations. (Tr. 16.)  
12 After summarizing the evidence, including Plaintiff's testimony, the  
13 ALJ found Plaintiff's allegations of disabling symptoms were not  
14 credible to the extent they were inconsistent with his assessment.  
15 (Tr. 13-18.) Based in part on VE testimony, the ALJ concluded  
16 Plaintiff's RFC would allow her to perform past relevant work as a  
17 bartender and cashier checker. (Tr. 19.) He proceeded to step  
18 five and found there was a significant number of other jobs in the  
19 national economy Plaintiff could perform with her current RFC, such  
20 as parking lot attendant, outside deliverer and seated cashier.  
21 (Tr. 19-20.) He concluded Plaintiff was not disabled, as defined by  
22 the Social Security Act, from her alleged onset date through the  
23 date of his decision. (Tr. 20.)

#### 24 ISSUES

25 The question presented is whether there is substantial evidence  
26 to support the ALJ's decision denying benefits and, if so, whether  
27 that decision is based on proper legal standards. Plaintiff  
28

1 contends the ALJ erred when he (1) failed to properly evaluate her  
2 treating medical provider opinions; (2) discounted her testimony;  
3 and (3) assessed her RFC. (Ct. Rec. 14 at 11-18.)

#### 4 DISCUSSION

##### 5 A. Credibility

6 As stated by the Ninth Circuit:

7 An ALJ cannot be required to believe every allegation of  
8 disabling pain, or else disability benefits would be  
9 available for the asking, a result plainly contrary to 42  
10 U.S.C. § 423 (d)(5)(A). . . . This holds true even where  
11 the claimant introduces medical evidence showing that he  
has an ailment reasonably expected to produce some pain;  
many medical conditions produce pain not severe enough to  
preclude gainful employment.

12 *Fair v. Bowen*, 885 F.2d 597, 603 (9<sup>th</sup> Cir. 1989). In deciding  
13 whether to admit a claimant's subjective symptom testimony, the ALJ  
14 must engage in a two-step analysis. *Smolen v. Chater*, 80 F.3d 1273,  
15 1281 (9<sup>th</sup> Cir. 1996). Under the first step, the claimant must  
16 produce objective medical evidence of underlying "impairment," and  
17 must show that the impairment, or a combination of impairments,  
18 "could reasonably be expected to produce pain or other symptoms."  
19 See *Cotton v. Bowen*, 799 F.2d 1403, 1407 (9<sup>th</sup> Cir. 1986)(*overruled on*  
20 *other grounds*). If this test is satisfied, the ALJ may reject a  
21 claimant's testimony if he finds affirmative evidence of  
22 malingering. *Benton v. Barnhart*, 331 F.3d 1030, 1040 (9<sup>th</sup> Cir.  
23 2003). However, where there is no affirmative evidence of  
24 malingering, a claimant's testimony may be rejected only with  
25 specific "clear and convincing" reasons). *Lester v. Chater*, 81 F.3d  
26 821, 834 (9<sup>th</sup> Cir. 1995).

27 In addition to ordinary techniques of credibility evaluation,  
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1 the ALJ may consider the following factors when weighing the  
2 claimant's credibility: the claimant's reputation for truthfulness,  
3 inconsistencies either in her allegations of limitations or between  
4 her statements and conduct, daily activities and work record, and  
5 testimony from physicians and third parties concerning the nature,  
6 severity, and effect of the alleged symptoms. *Fair*, 885 F.2d 597  
7 n.5 (9<sup>th</sup> Cir. 1989); *Light v. Social Sec. Admin.*, 119 F.3d 789, 792  
8 (9<sup>th</sup> Cir. 1997). If the ALJ's credibility finding is supported by  
9 substantial evidence in the record, the court may not engage in  
10 second-guessing. See *Morgan*, 169 F.3d at 600; *Fair*, 885 F.2d at 604  
11 ("[C]redibility determinations are the province of the ALJ").

12 After finding Plaintiff's medically determinable impairments  
13 could be expected reasonably to cause the alleged symptoms (Tr. 17),  
14 ALJ Chester summarized Plaintiff's testimony: she could not work  
15 because her back hurts all the time; she is unable to sit, stand or  
16 walk for very long; her hands go numb three or four times a day for  
17 a half hour to two hours; she needs to lie down three to four times  
18 a day; and she has trouble breathing and uses a nebulizer four times  
19 a day. (Tr. 17.) He found her testimony was not credible to the  
20 extent her self-reported symptoms were inconsistent with her ability  
21 to do the light work described in his RFC findings. (*Id.*) He first  
22 found her statements were inconsistent with objective medical  
23 evidence, which showed her back problems existed prior to her claim  
24 of disability, but does not show any worsening of her condition.  
25 (*Id.*) This reason alone would be insufficient to reject Plaintiff's  
26 statements. *Lester*, 81 F.3d at 834. However, it is supported by  
27 substantial evidence, and it is not the only reason given by the

1 ALJ. He also found her self-reported limits on sitting were not  
2 consistent with her testimony that she could ride in a car for two  
3 hours, and she was planning a road trip. (Tr. 17.) He found the  
4 records indicate a pattern of drug seeking behavior, a finding that  
5 significantly impugns her testimony. See *Verduzco v. Apfel*, 188  
6 F.3d 1087, 1090 (9<sup>th</sup> Cir. 1999).

7 As found by the ALJ, and indicated by reports from medical  
8 providers, Plaintiff has been non-compliant in her prescribed  
9 dosages and violated her pain medication contract several times; she  
10 has been insistent that her doctors provide her pain medication,  
11 even when she has been non-compliant; and she tested positive for  
12 cannabis - behaviors that call into question whether she is actually  
13 experiencing pain or is seeking narcotics for her addiction. (Tr.  
14 17-18.) The ALJ's reasoning is supported by reports from emergency  
15 room personnel who treated Plaintiff for polypharmacy-related  
16 psychiatric issues. (Tr. 510.) Hospital physician Arnold Kadrmas,  
17 M.D., reported Plaintiff was initially cooperative during her  
18 hospitalization with efforts to decrease her medication. However,  
19 during the course of her stay, her reports of back pain and demands  
20 for pain medication were increasingly demanding and incongruent with  
21 her activities (including exercise classes). As observed by staff,  
22 she did not demonstrate excessive pain behavior at these times.  
23 (Tr. 510-11.) Dr. Kadrmas noted, "She remained significantly  
24 focused on getting pain medication for her back," but did not want  
25 to go to chemical dependency counseling as recommended. (Tr. 511.)  
26 Dr. Kadrmas also reported that at discharge, after medications were  
27 decreased, there was no evidence of delirium, depression, or

1 suicidal ideation. (Tr. 511.) He shared his recommendations  
2 regarding decreasing medications and chemical dependency treatment  
3 with Plaintiff's treating physician. (Tr. 513.) The ALJ's findings  
4 regarding Plaintiff's narcotic seeking behavior are "clear and  
5 convincing" reasons to discount her pain and limitation testimony.

6 In addition, the ALJ noted Plaintiff's description of her  
7 breathing problems are undermined by her refusal to quit smoking -  
8 a refusal which diminishes her allegations of symptom severity. The  
9 ALJ's "clear and convincing" reasoning is supported by substantial  
10 evidence in the record and, therefore, will not be disturbed.

11 **B. Evaluation of Medical Opinions**

12 In addition to the credibility findings discussed above, the  
13 ALJ found Plaintiff's treating physician Anthony Lundberg, D.O.,  
14 opined in March 2006, that Plaintiff could do light work. He gave  
15 this opinion significant weight. (Tr. 18.)<sup>1</sup> However, Plaintiff  
16 argues this finding is not supported by substantial evidence  
17 because, in a form report dated January 24, 2007, and submitted to  
18 the state public assistance program, Dr. Lundberg endorsed a  
19 "severely limited" finding and opined she would be restricted in  
20 numerous work activities. (Tr. 319.) Plaintiff contends findings  
21 in this report were ignored impermissibly by the ALJ, and as such,

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23 <sup>1</sup> In discussing Dr. Lundberg's opinion that Plaintiff could  
24 perform light work, the ALJ referenced a date of March 2006 (Tr.  
25 18), which appears to be a clerical error. The clinic note in which  
26 he told Plaintiff she could "certainly do light duty work," was  
27 entered on November 7, 2006, in response to a telephone inquiry from  
28 Plaintiff. (Tr. 303.)

1 they must be credited and given controlling weight. (Ct. Rec. 14 at  
2 12.) She also posits the ALJ failed to give legally sufficient  
3 reasons for rejecting treating medical providers Mary Barinaga,  
4 M.D., and Blaze Burnham, ARNP. (*Id.* at 13-15.)

5 In evaluating a disability claim, the adjudicator must consider  
6 all medical opinions provided. 20 C.F.R. §§ 404.1527(d),  
7 416.927(d). A treating or examining physician's opinion is given  
8 more weight than that of a non-examining physician. *Benecke v.*  
9 *Barnhart*, 379 F.3d 587, 592 (9<sup>th</sup> Cir. 2004). If a treating  
10 physician's opinions are not contradicted, they can be rejected by  
11 the decision-maker only with "clear and convincing" reasons. *Lester*  
12 *v. Chater*, 81 F.3d 821, 830 (9<sup>th</sup> Cir. 1995). If contradicted, the  
13 ALJ may reject the opinion with specific, legitimate reasons that  
14 are supported by substantial evidence. *Lester*, 81 F.3d at 830-31;  
15 *Flaten v. Secretary of Health and Human Serv.*, 44 F.3d 1453, 1463  
16 (9<sup>th</sup> Cir. 1995). Final resolution of conflicts in the medical  
17 evidence is the sole responsibility of the ALJ. *Andrews*, 53 F.3d at  
18 1039.

19 The ALJ need not accept a treating source opinion that is  
20 "brief, conclusory and inadequately supported by clinical finding."  
21 *Lingenfelter v. Astrue*, 504 F.3d 1028, 1044-45 (citing *Thomas v.*  
22 *Barnhart*, 278 F.3d 947, 957 (9<sup>th</sup> Cir. 2002)). Where an ALJ  
23 determines a treating or examining physician's stated opinion is  
24 materially inconsistent with the physician's own treatment notes,  
25 legitimate grounds exist for considering the purpose for which the  
26 doctor's report was obtained and for rejecting the inconsistent,  
27 unsupported opinion. *Nguyen v. Chater*, 100 F.3d 1462, 1464 (9<sup>th</sup> Cir.

1 1996.) Rejection of a medical source opinion is specific and  
2 legitimate where the opinion is not supported by the doctor's own  
3 medical records and/or objective data. *Tommasetti v. Astrue*, 533  
4 F.3d 1035, 1041 (9<sup>th</sup> Cir. 2008).

5 In addition to accepted medical source opinions, the ALJ is  
6 required to consider observations by "other sources," i.e., nurse  
7 practitioners, physician's assistants, mental health therapists, and  
8 social workers, as to how an impairment affects a claimant's ability  
9 to work. 20 C.F.R. §§ 404.1513(d), 416.913(d); *Sprague*, 812 F.2d at  
10 1232. Although, under the Regulations, other sources cannot  
11 establish a medically determinable impairment, the Commissioner has  
12 ruled that weight given to their opinions must be evaluated on the  
13 basis of certain factors, e.g., their professional qualifications,  
14 how consistent their opinions are with the other evidence, the  
15 amount of evidence provided in support of their opinions, whether  
16 the other source opinion is well-explained, and whether the other  
17 source "has a specialty or area of expertise related to the  
18 individual's impairment." *Social Security Ruling (SSR)* 06-03p.<sup>2</sup> An  
19 adjudicator may consider these factors in giving the non-medical  
20 treatment provider's opinion more weight than that of an acceptable  
21 medical source. *Id.* A full explanation of the weight given an

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22 <sup>2</sup> Social Security Rulings are issued to clarify the Regulations  
23 and policy. They are not published in the federal register and do  
24 not have the force of law. However, under the case law deference is  
25 to be given to the Commissioner's interpretation of the Regulations.  
26 *Ukolov v. Barnhart*, 420 F.3d 1002 n.2 (9<sup>th</sup> Cir. 2005); *Bunnell v.*  
27 *Sullivan*, 947 F.2d 341, 346 n.3. (9<sup>th</sup> Cir. 1991).

1 other source opinion must be included in the ALJ's decision when the  
2 other source is given greater weight than a treating source opinion.  
3 *Id.*

4 A review of the record shows Dr. Lundberg stated in a November  
5 7, 2006, clinic note that Plaintiff could "certainly do light duty  
6 work." (Tr. 13, 18, 303.) As mentioned above, this comment was  
7 entered after responding to Plaintiff's phone call, in which she  
8 specifically asked if she could do some light duty work. (Tr. 303.)  
9 On January 24, 2007, Dr. Lundberg signed a medical evaluation form  
10 report indicating Plaintiff was severely limited and should not lift  
11 more than five pounds. (Tr. 319.) The ALJ did not mention this form  
12 report specifically in his summary of the medical evidence or his  
13 discussion of Dr. Lundberg's opinions. (Tr. 14, 18.) Although an  
14 ALJ is not required to discuss all evidence presented, the fact that  
15 in January 2007, Dr. Lundberg found Plaintiff unable to lift more  
16 than five pounds and severely limited in her ability to do certain  
17 job tasks renders this medical opinion sufficiently significant to  
18 address and either credit or reject. *See Vincent v. Heckler*, 739  
19 F.2d 1393, 1394-95 (9<sup>th</sup> Cir. 1984). Defendant's argument that this  
20 omission is harmless error because there is evidence in the record  
21 to justify rejection by the ALJ is not persuasive. First, the court  
22 may not make findings for the Commissioner. The reviewing court is  
23 "constrained to review the reasons the ALJ asserts." *See Connett v.*  
24 *Barnhart*, 340 F.3d 871, 874 (9<sup>th</sup> Cir. 2003). Further, the ALJ did  
25 not address the opinion, so it cannot be certain that he considered  
26 it in his evaluation. The court can neither grant nor deny benefits  
27 based on evidence the Commissioner did not address. *Id.* Second,  
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1 Defendant's argument that the court should apply the Sixth Circuit's  
2 harmless error standard is misplaced. (Ct. Rec. 16 at 7, *citing*  
3 *Blakley v. Commissioner of Soc. Sec.*, 581 F.3d 399, 409 (6<sup>th</sup> Cir.  
4 2004)). In *Blakley*, the Sixth Circuit held it would be harmless  
5 error if an ALJ "fails to give good reasons on the record for  
6 according less than controlling weight to treating sources" if the  
7 opinion is "'so patently deficient that the Commissioner could not  
8 possibly credit it.'" *Blakley*, 581 F.3d at 409 (*emphasis*  
9 *added*)(*citation omitted*). This standard does not apply in this  
10 case.

11 The Regulations require the ALJ to consider all medical  
12 opinions, and here, the ALJ gave no reasons for ignoring an opinion  
13 that conflicts significantly with an opinion by the same treating  
14 source that was given controlling weight. As held by the Sixth  
15 Circuit, "the ALJ's incomplete weighing of [claimant's] treating  
16 sources is not an excusable *de minimis* procedural violation." *Id.*  
17 This apparent contradiction in medical evidence from Plaintiff's  
18 treating source cannot be ignored or considered a harmless oversight  
19 of the Commissioner.

20 The Commissioner has the sole responsibility for resolving  
21 conflicts in the medical evidence; therefore, it was reversible  
22 error for the ALJ to ignore these contradictory opinions. As stated  
23 above, the court can neither deny nor grant benefits based on  
24 evidence not addressed. Accordingly, remand for additional  
25 proceedings and a new ALJ decision is appropriate. *See Winans v.*  
26 *Bowen*, 853 F.2d 643, 647 (9<sup>th</sup> Cir. 1987). Independent review  
27 indicates Dr. Barinaga and ARNP Burnham also have had a lengthy  
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1 treating relationship with Plaintiff and submitted clinic notes and  
2 evaluation reports indicating she is severely limited in her ability  
3 to perform work tasks. (Tr. 445-52.) On remand, weight given to  
4 Dr. Barinaga's clinic notes and opinions regarding Plaintiff's  
5 limitations shall be fully explained, and specific, legally  
6 sufficient reasons shall be given if her opinions are rejected.  
7 Further, the opinions of treating ARNP Burnham shall be discussed  
8 and weight given as directed by the Commissioner in SSR 06-03p.

9 **C. RFC Determination**

10 The RFC determination represents the most a claimant can still  
11 do despite her physical and mental limitations. 20 C.F.R. §§  
12 404.1545, 416.945. In assessing the RFC, an adjudicator must  
13 consider carefully all medical evidence provided and determine what  
14 work-related activities a claimant can perform. In determining  
15 what a claimant can still do despite her severe impairments,  
16 consideration must be given to medical source statements from  
17 treating and consultative medical examiners. SSR 96-5p. Because  
18 the ALJ failed to adequately explain weight given or properly reject  
19 probative evidence from Drs. Lundberg and Barinaga and ARNP Burnham,  
20 the final RFC determination is not supported by substantial  
21 evidence. Further, it appears the ALJ relied primarily on non-  
22 examining agency physician opinions in assessing Plaintiff's  
23 physical RFC (Tr. 18-19, 403-10), and a brief, unexplained clinic  
24 note from Dr. Lundberg. (Tr. 18, 303.) This is not substantial  
25 evidence on which to base this critical determination. See *Lester*,  
26 81 F.3d at 831.

27 Because the evidence is ambiguous regarding Plaintiff's ability  
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1 to perform work activities, on remand, the ALJ shall develop the  
2 record regarding Plaintiff's physical capacities, psychological -  
3 mental limitations due to depression, the effects of multiple  
4 medications, and the severe impairment of opioid dependence. 20  
5 C.F.R. §§ 416.926(a)(c); 416.945(a)(3); see *Mayes v. Massanari*, 276  
6 F.3d 453, 459-60 (9<sup>th</sup> Cir 2001) (inadequate or ambiguous evidence  
7 triggers ALJ duty to develop record). The ALJ will then make a new  
8 RFC determination incorporating all of Plaintiff's credible  
9 limitations. Additional relevant records may be requested by the  
10 Commissioner, or submitted by Plaintiff, including mental health and  
11 chemical dependency counseling records from Palouse County  
12 counseling, which are referenced in the record. (Tr. 559, 594,  
13 617.) Attempts to obtain additional records should be described in  
14 the record. New vocational expert testimony must be taken at steps  
15 four and five to consider the effects of Plaintiff's newly assessed  
16 RFC on her occupational base. *Gonzalez v. Sullivan*, 914 F.2d 1197,  
17 1202 (9<sup>th</sup> Cir. 1990). Accordingly,

18 **IT IS ORDERED:**

19 1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 13**) is  
20 **GRANTED** and the matter is remanded to the Commissioner for  
21 additional proceedings pursuant to 42 U.S.C. § 405(g) and as  
22 directed above.

23 2. Defendant's Motion for Summary Judgment dismissal (**Ct.**  
24 **Rec. 15**) is **DENIED**.

25 3. Application for attorney fees may be made by separate  
26 motion.

27 The District Court Executive is directed to file this Order and  
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1 provide a copy to counsel for Plaintiff and Defendant. The file  
2 shall be **CLOSED** and judgment entered for **PLAINTIFF**.

3 DATED August 20, 2010.

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5 S/ CYNTHIA IMBROGNO  
6 UNITED STATES MAGISTRATE JUDGE  
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